BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Interconnection and Resale Obligations	)	CC Docket No. 94-54
Pertaining to Commercial Mobile Radio Services	)	

REPLY COMMENTS OF THE NATIONAL WIRELESS RESELLERS ASSOCIATION

July 14, 1995

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SUMMARY

The Commission's tentative conclusion that a market power analysis should be its focus in determining if CMRS to CMRS interconnection or switch-based resale are in the public interest, is incorrect. Such an interpretation is inconsistent with the structure of Section 332 and Congressional goals.

With respect to the propriety of bringing under Section 208 an initial request for interconnection, case law holds that the Commission may order interconnection pursuant to a Section 208 proceeding, even though the Commission has not previously ordered the specific type of interconnection requested. The Commission must clearly define a CMRS provider's duty to establish physical interconnections with another CMRS provider or a reseller, and should describe in detail how the Commission will resolve disputes if voluntary switch-based resale or interconnection negotiations fail.

The Commission is reassessing bidding preferences for Block C PCS licenses because of the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) ("Adarand"). Though the Adarand decision may foreclose opportunities for small businesses, women and minorities, switch-based resale, will open new avenues for small businesses, women and minorities to get involved in the wireless market and should be viewed as an important alternative means of carrying out congressional policy to promote wireless competition and innovation by participation of these groups in the system of distribution of CMRS to the public.

The general objections to switched resale regarding technical infeasibility and economic costs are cursory and raise no substantial issues. Specific technical issues raised by commenters like

AT&T and the Cellular Telecommunications Industry Association ("CTIA") will be resolved primarily through more technologically advanced hardware and software that the resellers' switch proposal incorporates. Any remaining technical issues are amenable to resolution through good faith negotiations. With respect to identifying costs, none of the commenters discuss specific costs which will hamper a CMRS provider's ability to serve the public if switched resale is required.

As for state regulation of commercial mobile services, the Commission should preempt only those state regulations that pertain to entry or rates in commercial mobile services, or are inconsistent with the Commission's rules.

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The National Wireless Resellers Association ("NWRA"), by its attorneys, respectfully submits its reply to the comments of other parties in the above-captioned proceeding. These reply comments will primarily address the question of switch-based resale, a proposal which the Commission has tentatively concluded in paragraphs 95 and 96 of the Second Notice of Proposed Rulemaking in Docket 94-54 (hereinafter "Second Notice") that it should not adopt as a general requirement at the present time.

I. Introduction

1. The comments filed in this proceeding opposing generally mandated interconnection and switched resale fall into a predictable pattern, reflecting the narrow private interests of the facility-based CMRS carriers and their various trade associations. Their comments do little to advance the position that the public interest and competition will be enhanced by refusing to allow switch-based resale. Rather, like the FCC's tentative analysis in the Second Notice they are left only with the negative arguments that there may be costs and technical problems associated with installation of reseller switches and with general assertions that the marketplace is now competitive. The General Services Administration, on the other hand, the procurement office for the federal executive agencies

(a large purchaser of communications service) strongly supports interconnection, resale and the switch-based resale proposal because it is in a unique position to recognize the need for competitive wireless vendors and, like NWRA, reads Congressional policy as requiring the FCC to enhance wireless competition. The Commission should give its views substantial deference.

2. Those who oppose the switch-based resale proposal assume that the Commission has the legal discretion not to adopt a general interconnection requirement for resellers. They also assume that the market power analysis, which the Commission has suggested should largely apply to determine whether to adopt interconnection or switch-based resale requirements, represents the correct standard against which the Commission should decide this rule making.[1/] Further, those who oppose switch-based resale and interconnection requirements also urge that no general CMRS-to-CMRS policies are needed because, in the absence of market power, no provider of CMRS service will fail to respond in the marketplace to appropriate interconnection requests. NWRA will address these assumptions and contentions in these reply comments, together with the alleged technical and economic difficulties that are said to attend the adoption of general switch-based resale requirements. In light of recent developments regarding the legality of minority, women's and small business preferences for PCS license awards,[2/] the encouragement and support of resale generally, and switch-based resale, in particular, may present other opportunities to these groups to participate in the development of wireless services without the legal barriers to entry on a facility basis which is the

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1/ NWRA recognizes that the Commission has asked (¶¶ 41-42 of Second Notice) for comments on public interest factors under Section 201 other than market power, but the text is heavily weighted to the market power analysis, particularly the brief discussion of switch-based resale in ¶¶ 95-96.

2/ See Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) ("Adarand").

likely fallout in the wake of the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

II. The Commission's Tentative Conclusion That it Should Not Generally Require Switch-Based Resale or CMRS to CMRS Interconnection Unless a CMRS Provider Has Significant Market Power Is Incompatible with Section 332(c) of the Act.

3. The Commission has stated (¶ 41, Second Notice) that a market power analysis should be the basic analysis it conducts to determine whether the public interest requires the imposition of general interconnection obligations on CMRS providers. Its discussion of switch-based resale appears to follow this same line of reasoning.[3/] However, Congress' goal in enacting Section 332 was to actively promote competition in commercial mobile services. The vigorous promotion of competition among all CMRS providers must be at the heart of the Commission's public interest analysis under Sections 332(c)(1)(B) and 201(a), rather than the mere containment of possible anticompetitive behavior by carriers who may have market power.

3/ CMRS, Second NPRM at ¶ 41 and ¶¶ 95-96.

4. Section 332(c)(1)(A) states unequivocally that the Commission can not forbear from enforcing Sections 201, 202 and 208.[4/]

The Commission suggests it may decline to order interconnection or switched resale, however, under 201(a) if there are no dominant carriers in the relevant market even though interconnection may otherwise be consistent with the public interest and promotion of competition. Congress intended the Commission to promote competition through interconnection under Section 201(a). Congress did not intend the Commission to decline to order interconnection merely because no carrier has market power.

5. If Congress intended this result it would have given the Commission the authority to forbear from applying Section 201(a), just as it did with the other Title II provisions. Then, the Commission could decline to order interconnection if, as with the other Title II provisions: (i) no carriers have the market power to set unjust, unreasonable or discriminatory rates; (ii) the consumers will be protected; and (iii) the Commission's policy is in the public interest. The very fact that

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[4/] This section then allows the Commission to forbear from applying other Title II provisions if, and only if, . . .

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (ii) enforcement of such provision is not necessary for the protection of consumers; and
>
> (iii) specifying such provision is consistent with the public interest.

47 U.S.C. § 332(c)(1)(A).

Congress expressly disallowed the Commission forbearance authority with respect to Section 201 as it did with other Title II provisions, can only be interpreted as precluding the Commission from basing the public interest inquiry upon a market power analysis specifically applicable only to forbearance of other Title II provisions.

6. Furthermore, the policies reflected by the structure of the statute reflect sensible policy. It is clear from the language of Section 332(c)(1) that Congress intended the vigorous enhancement of wireless competition to be the essence of the public interest standard. For instance, Section 332(c)(1)(C) states that forbearance from Title II regulation (other than 201, 202 and 208) is permissible if, inter alia, such forbearance will "promote competition among providers of commercial mobile services."[5/] Congress emphasized its concern with enhancing competition by requiring the Commission to "review competitive market conditions with respect to commercial mobile services and [ ] include in its annual report . . . a statement of whether additional providers or classes of providers in those services would be likely to enhance competition." See 47 U.S.C. § 332(c)(1)(C). The legislative history to Section 332(c)(1)(B) states that "the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[6/] Congress does not even hint in Section 332 or the legislative history that the Commission should actively promote competition by

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5/ See sections 332(c)(1)(A)(iii) and (c)(1)(C). No commentor here can, or has even attempted to, explain why Congress would allow the FCC to forbear from most Title II regulation if, inter alia, forbearance would promote competition, yet permit the Commission not to require interconnection under 201 (for which it has no forbearance authority) even if such interconnection would promote competition.

6/ H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. 261 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588.

merely containing the anticompetitive behavior of dominant carriers. This isn't because Congress was unconcerned about carriers acquiring market power but because full competition through interconnection ought to prophylactically prevent that condition from occurring. Congress' focus is on fostering interconnection as a means to achieve an ubiquitous network. The Commission must follow the statutory scheme. Promoting interconnection, and seamlessness, should be the foundation of the Commission's public interest inquiry.

7. If the Commission were to adopt market power as the basic standard for imposing specific interconnection obligations pursuant to Sections 332(c)(1) and 201(a), the Commission would be ignoring the plain language and only sensible reading of Section 332(c)(1), and the legislative history.[7/] By pursuing its own policy objectives which appear designed to minimize its regulatory role regardless of Congress' intent, the Commission would be heading down the same path it traveled in AT&T v. FCC, 978 F2d 727 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 3020 (1993) and MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223 (1994). It would be improperly ignoring plain statutory language while implementing administrative goals rather than Congressional policy.

8. The comments in opposition to interconnection and switch-based resale are content to let the Commission stray into such legal error. By the time the courts have the opportunity to set the correct standard, entrenched CMRS providers will have substantially enhanced their positions in the CMRS marketplace, and delayed the arrival of a vigorously competitive wireless market.

7/ Paradoxically, abjuring imposing conditions promoting full competition because of the supposed absence of market power may lead to carriers being better positioned to obtain such dominant market positions.

III. The Commission Cannot Desist From Deciding a Section 201(a) Interconnection Issue in a Section 208 Complaint Proceeding Even if the Commission Has Not Previously Issued a Rule Mandating Interconnection.

9. Two commenters, New Par and Comcast (both of which are the subjects of pending Section 208 complaints), assert that the Commission may not consider an initial request for interconnection brought before the Commission as a section 208 complaint, in the absence of a rule or policy requiring interconnection.[8/] They are mistaken.

10. In re CPI Microwave, Inc., 49 F.C.C.2d 778 1974), modified, 53 F.C.C.2d 1132 (1974), stands for the proposition that, under Section 201(a), the Commission may order interconnection following a non-evidentiary hearing, even though the Commission has not previously required the specific type of interconnection requested. See also AT&T v. F.C.C., 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 3020 (1993) ("Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking. But they cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively.")

11. New Par cites Tri-City Telephone Co., 20 F.C.C.2d 674 (1969) ("Tri-City") as evidence that a section 208 complaint proceeding is not a proper vehicle for the Commission to use in deciding if a particular type of interconnection is in the public interest. To the contrary, in Tri-City the Commission merely chose to decide the particular 201(a) interconnection issue pursuant to a full hearing. Similarly, the cases cited by Comcast are silent about the type of opportunity for hearing --

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8/ See Comments of New Par at pp. 15-18, and Comments of Comcast at pp. 12-14 & 16-19, filed June 14, 1995, in response to Second Notice.

rulemaking versus full evidentiary hearing versus mere submission of written comments and reply comments -- that the Commission must provide under Section 201(a).[9/]

12. The motivation for the arguments made by New Par and Comcast is obvious -- they are attempting to avoid the 208 complaint process to which they must now respond. However, their arguments illustrate the problem created by the Commission's lack of clarity. How does the Commission intend to distinguish between a general requirement for interconnection and switch-based resale, and specific implementation of ad hoc requests that may be made from time to time? NWRA has itself been concerned that the wireless industry may read the Commission's Second Notice and whatever Report and Order that may result therefrom as freeing them to decline to agree to a specific request for interconnection or switch-based resale although the Commission may do no more than fail to adopt a general requirement with respect to such features.

13. This is a real issue and not answered by industry assurances that carriers will voluntarily agree to interconnection or resale arrangements that make economic sense. What the smooth assurances mean is that if it is economically advantageous to the party which has the power to deny interconnection then the arrangement will be voluntarily agreed to. But CMRS providers have unequal bargaining positions and a more likely scenario is that interconnection or resale will be denied to the party for which it is most needed and with the least bargaining position, and without regard to the general public interest from such interconnection, resale, or switched resale.

9/ See United States v. AT&T, Memorandum of Federal Communications Commission as amicus curiae, Civ. No. 74-1698 (D.D.C. 1975), reprinted in Satellite Business Systems, 62 F.C.C.2d 997 (1977); Southern Pac. Communications Co. v. AT&T, 556 F. Supp. 825 (D.D.C. 1983), aff'd., 740 F.2d 980 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

14. NWRA believes the Commission intended in the Second Notice only to examine general requirements and require good faith responses to reasonable ad hoc requests for interconnection from CMRS providers. Such a procedure, however, must be attended by an FCC requirement that carriers carry the burden of demonstrating that a specific interconnection request or one for switch-based resale is contrary to the public interest under the AT&T Premises Ruling standards,[10/] and clearly state that carriers do not retain the arbitrary discretion to reject arrangements which they do not find favorable. Thus, we believe it would be preferable if the Commission adopt the general requirements mandating interconnection, resale and switch-based resale but recognize that the Commission may prefer to examine ad hoc requests brought to it if parties are unable to arrive at voluntary agreements.[11/] NWRA has previously set forth in its comments here, why it would advance efficient use of the Commission's resources to adopt general requirements and that a strong statement of the duty of facilities-based carriers to entertain and negotiate good faith requests for interconnection and switch-based resale is minimally needed. Such a rule or policy statement would go far to avoid having such disputes land at the Commission's doorstep at a future time.

15. The attitudes reflected in the New Par and Comcast comments regarding the authority of the Commission to entertain Section 208 complaints makes it imperative that the Commission clarify any decision it arrives at as to the scope of interconnection and switch-based resale as well as the forum within which such requests should be brought and how they will be adjudicated if

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10/ See 60 F.C.C. 2d 939 (1976).

11/ The pertinent model which should be followed, as NWRA has previously urged is the procedure that has led (with minimal FCC involvement) to LEC-cellular interconnection agreements. See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 F.C.C.R. 2910, 2912-2913 (1987).

voluntary negotiations fail. Needless to say, any outcome here that refuses to enforce reasonable requests for interconnection or switch-based resale from any CMRS provider, either generally or on an ad hoc basis, would be illegal and would be subject to immediate judicial review.

IV. Switch-Based Resale Will Enlarge the Opportunity for Minorities, Women and Small Business to Participate as Wireless Entrepreneurs.

16. The Supreme Court's opinion in Adarand, 115 S.Ct. 2097 (1995), has forced the Commission to propose abandoning the preferences that bidders for the Block C PCS licenses would otherwise obtain should they be women or minorities. See Further Notice of Proposed Rulemaking released June 23, 1995 (F.C.C. 95-263, PP Docket No. 93-253). Commission review of the bidding preferences that minorities and women otherwise would have been entitled to for the Block C PCS licenses raises a number of substantial concerns that are relevant to the instant proceeding. First, as the Commission has noted in the Further Notice of Proposed Rulemaking in Docket 93-253, delay in the auctioning of the Block C licenses may well have the unfortunate consequence of further exacerbating the head start which cellular, ESMR and Block A and B PCS licenses may obtain over proposed Block C licensees. Secondly, the opportunity for minority and female participation in the provision of spectrum-based services, that Congress mandated in Section 309(j)(4)(D) may now be set aside in light of the Supreme Court's opinion. While the Commission has proposed to ameliorate these consequences by the rule changes it has proposed in its June 23, 1995, Further Notice of Proposed Rulemaking, it must be recognized that those proposals will not likely have the same beneficial impact as the initial preferences for the Block C PCS licenses.

17. However, the ability of minority or women-owned small businesses to participate in the wireless revolution is not lost merely because they may not be able to obtain the preferences that

were contemplated for the Block C licenses. A similar opportunity is available to women and minorities to participate in the provision of wireless services through switch-based resale. For relatively smaller amounts of capital and without the necessity to compete for spectrum against larger companies, such entrepreneurs can become part of the delivery system for wireless service that Congress sought to achieve with bidding preferences.

18. The bidding preferences which Section 309(j)(3)(B) of the Communications Act contemplated should be extended to women and minorities was intended, inter alia, to promote "economic opportunity and competition and [ensure] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses." Those goals are realizable through switch-based resale if not now through bidding preferences for wireless spectrum. The Commission should consider switch-based resale of wireless services as yet another means by which the wireless market ownership structure would be upgraded consistent with Congressional policy.

V. None of the Comments Demonstrate Any Technical or Economic Reason Why the Opportunity for Switched-Based Resale Should Not Be Imposed on Wireless Carriers.

A. Technical Issues.

19. No credible demonstration of technical infeasibility has been supplied in the initial comments in this proceeding. For the most part those who oppose switched-based resale merely assert, without supporting data or argument, that technical issues may attend the installation of reseller switches. These comments can safely be ignored by the Commission, representing only the blind refusal of carriers to recognize the advances in switched digital technology and the

commonplace feature of computers interfacing in all aspects of the telecommunications industry. The detailed prior submissions of NWRA and the comments of Time Warner herein are compelling support for the likely absence of technical problems that cannot be addressed, or if present, resolved in good faith negotiations among resellers and facility-based providers.

20. AT&T attempts to raise several potential technical problems with switch-based resale. It claims that there are no signaling protocols to direct call traffic to a reseller's switch to complete the call. However, calls will be routed from the facility-based carrier to the reseller's switch via the SS-7 signaling network and associated voice trunks. The reseller's switch will receive the mobile subscribers dial digits and route the call based upon those digits. No lack of compatibility will arise with a properly designed interface of the reseller and the carrier's switch and there is no reason for a reseller to propose an installation that will not work or will clearly cause technical problems. AT&T's claim that 911 calls made by a reseller's switch subscriber would require special applications and back up service by the carriers' MTSO presents no significant issue. Existing facility-based carriers do not now have "back-up service" for the 911 call handling and there is no reason to believe that switch-based resellers would need to provide such a back up if the carriers themselves do not provide it. Also, the issue of identifying the location of 911 calls by cell-site location is merely a software design problem. Thus, it represents a business issue to be discussed between the carrier and the reseller rather than any technical impediment to the installation of the reseller's switch. The same can be said for the question of whether vertical features, such as call waiting, three-way calling, and call transfer must be handled only by the carriers' MTSO. Again, this is a business issue involving the installation of compatible software. If a reseller is willing to make the business judgement not to offer such features to its customers, it will have to live with that

decision in the marketplace. The question, therefore, again, is not one of technical infeasibility but of the entrepreneurial decisions that a reseller will make. Again AT&T's reference to the fact that currently billing information may not include the originating cell-site involves only a business issue of the cost of installing the correct software in order to provide this feature. It is not a technical question.

21. AT&T also claims that the reseller's switch may malfunction and result in "hammering" which may occur when subscribers repeatedly attempt to access the network because of a malfunctioning reseller's switch. The example is apparently intended to illustrate that resellers will design their equipment to maximize this possibility. To the contrary, the reseller's interest is to make sure that their equipment is as reliable and "state of the art" as is possible. Resellers will install new switches, not the ones designed five to ten years ago that now form the basis of the backbone of the cellular carrier's infrastructure and which are subject to much more unreliable functioning than any new state of the art equipment that resellers will obtain. AT&T also raises as a technical issue the question of whether the reseller's switch will be capable of protecting against fraud. Again, this is not a technical problem only a business issue for the reseller. In fact, as NWRA has pointed out in its prior comments, one of the substantial advantages of a reseller's switch is the ability of that equipment to monitor on a real time basis subscriber usage of the network and identify more quickly fraudulent calls. Finally, AT&T points out as a technical issue that resellers' customers would be deprived of roaming capability unless the resellers enter into independent roaming arrangements. This is not a technical issue, only, again, a business question for the reseller. Resellers will enter into roaming agreements with other facility-based carriers just as existing carriers now have roaming agreements with other carriers in other service areas. The only obstacle

to such roaming agreements would be the refusal of a carrier to enter into a roaming agreement with a reseller. This problem, which if it arises, can be readily cured by the Commission making plain that no carrier can refuse to provide service to a wireless customer merely because the customer obtains service through a reseller rather than another facility-based carrier. Any such attempt by a carrier to refuse to enter into roaming agreements with resellers would be clearly discriminatory and illegal under Section 202 of the Communications Act.

22. Finally, AT&T claims that there are other supposed "technical" problems with the resellers' switch proposal, primarily involving what AT&T claims would be "considerable inefficiencies" in the installation of a second switch to the cellular network. The question of inefficiency is not a technical issue, even though AT&T claims that there would be less efficient interconnection with the landline network and increased delay and possible degradation of the quality of service by reseller customers by forcing calls to be routed through an additional transmission link. This claim is made without any supporting data. The delay and degradation factors claimed by AT&T but which it does not elucidate, are a product of its imagination given the state of the computer and communications arts today to deliver transparent, seamless service. Finally, the contention of AT&T and others that the reseller's switch would not provide subscribers with any services that they can not already obtain from existing cellular carriers' switches is a bid to build a wall around the existing technology and to prevent the opportunity to arise for technical innovation that resellers with their own switches might provide. The Commission does not have the authority to stand in the way of competitive, innovative service particularly if the cost of providing it is borne by the party attempting to bring new services to the public. Any reseller that misjudges the market or does not provide a truly innovative or new service that subscribers value will

disappear. What the carriers may not do is hide behind a claimed exclusive monopoly to innovate or to provide exclusive services to the public through only their own facilities. If that were true, there would be no need for any new CMRS providers or the breakup of the AT&T unitary system. Similarly there would be no reason for the Commission to authorize two cellular carriers in each market since one, on this theory, would always operate more efficiently and could always provide the service that a second carrier would provide. AT&T's argument is nothing more than an appeal to the supposed efficiency of monopoly service which has been clearly and repeatedly and correctly rejected by the Commission, and now by Congress with respect to wireless common carrier services.[12/]

B. Economic Issues

23. In its initial comments NWRA welcomed the opportunity to review showings as to the cost which those who oppose switch-based resale assert would be imposed unreasonably upon them should the Commission endorse the proposal to allow resellers to provide switch-based service to their subscribers. None of the comments in this proceeding have provided any specific figures as to the cost to the carriers of requiring installation of a reseller's switch to their networks. This is not surprising and only reveals that the industry cost argument is not to be taken seriously. Moreover, no carrier can assert ruinous harm from the cost of accommodating a switch-based proposal in the

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12/ The comments of the Cellular Telecommunications Industry Association ("CTIA") are similarly bereft of any specific demonstration or compelling argument that the reseller switch proposal is either technically infeasible or otherwise impractical. To the extent needed, software and hardware vendors stand ready to respond to the new opportunities and meet whatever technical issues are raised by a particular interconnection or reseller switch proposal. See Comments here of E.F. Johnson, p. 3-6, and of The Information Technology Association of America (a trade association of 6,000 computer software and services companies).

absence of detailed discussion and negotiation over the manner in which the reseller's switch would be installed, the services that would be offered and the changes in the carrier's function that might be required to accommodate the reseller's proposal. Against this background the carriers merely attempt to assert in sweeping fashion that switch-based resale would impose some cost, unspecified, but arguably substantial, and that the switch would be duplicative of functions that are currently provided by the carriers' own MTSOs.

24. These general arguments must be rejected for a number of reasons. First, such claims run afoul of the FCC's AT&T Premises Ruling, 60 F.C.C. 2d at 939 (1976), that "a tariff restriction on interconnection purporting to protect against technical or economic harm is unreasonable if it assumes *a priori* that such harm will result." Id. at 943. There is no more reason to credit such claims in a rule making than in a specific proceeding, particularly because of two further factors. The Congressional policy requiring the FCC to promote wireless interconnection should not be held hostage to unsubstantiated technical or economic claims and the standard of economic harm which a carrier must meet is more than that its costs may rise or profits decline.

25. Rather, Congress directed in Section 332(c)(1)(b) that wireless interconnection shall be promoted by the Commission and under those policies, the economic harm a carrier must show is harm sufficient to "adversely affect[] its ability to serve the public."[13/] No such evidence or level of

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13/ AT&T Premises Ruling, 60 F.C.C. 2d at 943. The FCC there also made plain that the "privately beneficial, no public detriment" standard of Hush-a-Phone v. U.S., 238 F.2d 266 (D.C. Cir. 1956) applies under the general language of Section 201 and "embraces the interconnection of private line service as well as terminal devices." A reseller switch functions for the resellers' subscribers and the reseller as both a terminal device and private network feature in addition to playing the same role for switched resellers of wireline service under Section 201.

harm is even hinted at by any party. It is for this reason that the extended discussion by AT&T economist Owens as to the manner in which mandatory interconnection, resale, and the switch-based resale proposal may not optimize the efficient distribution of wireless services goes beyond being mere academic speculation. It is wholly irrelevant. Congress has not endorsed theories that serve only to further entrench existing wireless providers but mandated free, competitive markets, which may be somewhat chaotic, but have their own compelling efficiencies. The Owens line of argument goes only to demonstrate that little has changed at AT&T in the 20 years since the Commission opened the IXC market to competition by rejecting the same arguments that AT&T now makes to protect McCaw, its cellular subsidiary and the largest wireless provider in the country, from full marketplace competition.

VI. Unbundling and Rate Regulation.

26. Opponents of switched resale present arguments that unbundling of a facility-based carrier's discrete services is inappropriate, would require detailed FCC investigation and oversight of rates and lead to time consuming and complex proceedings before the FCC. Typical of the contentions made in this regard are the comments of Bell South which (page 11) assert:

> "Switch-based resale is not an issue of interconnection so much as a matter of establishing preferential unbundled rates. Creating an opportunity for the development of switch-based resale would require a time consuming and complex proceeding for the unbundling of CMRS licensees' service into discrete low-level components, together with the development of detailed cost accounting rules and rate regulation policies. [footnote omitted] The Commission has not adopted such rules or policies for cellular or other CMRS licensees to date, and Bell South suggests they would be most inappropriate in a competitive industry." [footnote omitted].

27. Bell South's contentions are not sufficient to defeat the switch-based reseller proposal. They are an effort to raise the spectacle of comprehensive governmental regulation to undermine a proposal which has large public interest benefits and is statutorily required. The Commission may not allow a decision in this proceeding on switch-based resale to hinge on the possibility that there may be a need for further Commission oversight.

28. In any event, the specter which Bell South raises is not a prospect likely to require any substantial Commission oversight of rates. In a free market where resellers have the ability to control their subscriber's choice of carriers and the numbers they use, carriers will have the incentive to negotiate aggressively for a reseller's business. This process will inevitably result in a lowering of the general price level, end user subscriber rates, and an increase in innovative technologies from which the public may choose. That process is a self-generating, self-regulatory one that flows from the structure of a competitive wireless market place rather than government rate setting. Once resellers and their subscribers are not arbitrarily tied to a particular carrier, but can use their bargaining power to leverage down rates among the CMRS providers in a particular area, there will be no need for government oversight of rates or rate regulation of the kind to which Bell South refers.

29. In addition to the usual disincentives of cost and time to litigate such issues before the Commission, it is only in the most egregious of cases that the Commission might expect to be confronted with the need to oversee setting of rates by carriers. Accordingly, the portrait of a horrendous prospect of rate regulation is grossly overstated if the Commission endorses the reseller switch concept and maximizes the opportunity for competitive offerings of CMRS service. However, even if Commission oversight is required for the unusual case, that is not a reason to fail

to obtain the general benefits of switch resale that will flow from its availability in most markets. It must be stressed, in this regard, that the Commission's statutory responsibility under Section 201 and 202 of the Communications Act is to allow interconnection that is in the public interest and to take steps to see that rates are just and reasonable and not unreasonably discriminatory under Section 202. That responsibility is one from which the Commission cannot shrink and it must make available the Section 208 complaint process for the purpose of assuring that the statutory requirements are met. Therefore, the prospect that the Commission might be called upon to exercise the statutory responsibilities which it is required to carry out cannot be used as a reason for denying to switch-based resellers the interconnection rights that Congress has also clearly set forth in Sections 332 and 201.

VII. State Regulation of Terms and Conditions of Commercial Mobile Services, Other Than Rates and Entry, is Permissible if Consistent With the Commission's Rules and Should Not Be Preempted.

30. Some comments argue that the Commission should preempt the states from imposing interconnection obligations on CMRS providers. [14/] The statute, however, expressly allows states to regulate terms and conditions of commercial mobile services, other than those directly relating to rates and entry. See 47 U.S.C. § 332(c)(3). To the extent then that services provided by a CMRS carrier fall within the category of "other terms and conditions" of service, a state may properly exercise its jurisdiction and regulate these services. Only if state regulation of these "other terms and conditions" of service are inconsistent with the Commission's rules, does the Commission have the

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14/ See Comments of AT&T at p. 20-23, and Comments of SNET at pp. 11-13, filed on June 14, 1995, in response to Second Notice.

power to preempt state regulation. Therefore, a state may properly impose an interconnection or resale obligation on a CMRS provider since such obligations are not rate or entry issues, and if the state obligation is consistent with the Commission's own interconnection and resale rules. Such a division of power between the Commission and the states reflects the structure of Section 332(c)(3) and Congress' intent. Moreover, it is far more sensible as a matter of policy than carrier suggestions that the FCC should not permit interconnection or switched resale and also preempt the states from doing so even if they discern a public benefit in such requirements at the state level.

Respectfully submitted

NATIONAL WIRELESS RESELLERS ASSOCIATION

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Dated: July 14, 1995

CERTIFICATE OF SERVICE

I, Shevry Davis, hereby certify that on this 14th day of July, 1995 copies of the foregoing "Reply Comments of the National Wireless Resellers Association" were delivered to the following

*Chairman Reed E. Hundt
Federal Communications Commission
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Washington, DC 20054

*Commissioner James H. Quello
Federal Communications Commission
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1919 M Street, NW, Rm. 802
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*Commissioner Andrew C. Barrett
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